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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROY WAYNE CHISM, Defendant and Appellant.	E047447 (Super.Ct.No. FVI800810) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed in part; reversed in part.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janet Neeley and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Roy Wayne Chism was previously convicted of a sex offense and, as a result, is required to register as a sex offender pursuant to Penal Code

section 290 et seq.[1] Defendant appeals from a jury conviction, because he believes there is insufficient evidence to support his convictions on the following two counts: count 2, failure to register each residence in violation of section 290.010; and count 3, failure to register as a transient in violation of section 290.011, subdivision (b). With respect to count 3, he contends the trial court prejudicially erred by failing to define the term "transient" to the jury. He also argues the trial court erred by not giving an unanimity instruction on count 1, failure to register within five days of changing residences, and count 4, failing to advise prior agency of a new residence. In addition, defendant requests a correction to the abstract of judgment to reflect the correct number of days of presentence credit.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, the parties stipulated defendant was convicted of a sex offense in a prior separate case which requires him to register as a sex offender. An employee of the sheriff's department in Apple Valley testified it was her responsibility to register sex offenders. On August 22, 2007, she was present when defendant went to the sheriff's station in Apple Valley and filled out the necessary forms to register his address as 22711 Waalew in Apple Valley (the 22711 Waalew residence). In addition to registering his address, defendant also initialed a form outlining the applicable registration requirements for sex offenders and indicated on the form that he read and understood the registration requirements.

A sheriff's deputy testified he was doing sex registration compliance checks on April 15, 2008, and he went to the 22711 Waalew residence. Defendant was not present at the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

residence, so the deputy began an investigation into his whereabouts. The deputy talked to defendant's ex-wife, Peggy Chism, as well as the next-door neighbor, Stacey Skinner. Based on his investigation, the deputy arrested defendant the next day, April 16, 2008, for failure to register. After his arrest, defendant told the deputy he did not register because "he didn't have a permanent place he was living" and because his "main priority" at the time was trying to secure a place for his son to live.

On October 30, 2008, a jury convicted defendant of failure to register (§ 290, subd. (b) (count 1)); failure to register each residence (§ 290.010 (count 2)); failure to register as a transient (§ 290.011, subd. (b) (count 3)); and failure to advise prior agency of move (§ 290.013 (count 4)). In addition, the trial court found defendant had one prior strike within the meaning of sections 1170.12, subdivision (a), and 667, subdivision (b), and served two prior prison terms within the meaning of section 667.5, subdivision (b). Defendant was sentenced to a total of six years in state prison. To reach the total, the court imposed the middle term of two years on count 1 and doubled it to four years because of the prior strike. The court then added two consecutive one-year terms for the prison priors. On counts 2, 3, and 4, the court imposed the middle term of two years but imposed a stay pursuant to section 654.

DISCUSSION

Sufficiency of the Evidence—Counts 2 and 3

Defendant contends there is insufficient evidence to support his convictions on count 2, failure to register each residence in violation of section 290.010, and count 3, failure to register as a transient in violation of section 290.011, subdivision (b), because the evidence

shows he moved from residence to residence, not that he concurrently had multiple residences or was a transient with no address.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Section 290, subdivision (b), requires sex offenders "to register . . . within five working days of coming into, or changing his or her residence . . . ." After their initial registration, sex offenders must also update their registration annually within five working days of their birthdays. (§ 290.012.) In addition, section 290.010 provides in part as follows: "[i]f the person who is registering has more than one residence address at which he or she regularly resides, he or she shall register in accordance with the Act in each of the jurisdictions in which he or she regularly resides, regardless of the number of days or nights spent there. If all of the addresses are within the same jurisdiction, the person shall provide

the registering authority with all of the addresses where he or she regularly resides." (§ 290.010.)

A defendant's failure to register as required by law is a continuing offense in that there is a continuing duty to satisfy registration requirements each time there is a triggering event, such as a birthday or a change of address. (*People v. Meeks* (2004) 123 Cal.App.4th 695, 702.) This does not mean a defendant cannot be convicted and punished for new and separate violations of registration laws when requirements are violated in more than one way or by separate triggering events. For example, "a failure to register when one moves to a different residence is a continuing offense; a failure to register on the event of the defendant's birthday is a separate continuing offense." (*Id*. at p. 703.) On the other hand, a defendant cannot be charged with a separate offense for each day he failed to register following a change of address. (*Ibid*.)

To establish a violation of section 290.010, formerly section 290, subdivision (g)(2), failure to register each residence, the People must prove all of the following elements: (1) the defendant is required to register as a sex offender under section 290 within five working days of establishing a second or temporary residence; (2) the defendant has actual knowledge of his obligation to register the second or temporary residence; (3) the defendant maintained a second or temporary residence; and (4) the defendant willfully failed to register the second or temporary residence. (*People v. Poslof* (2005) 126 Cal.App.4th 92, 97-99 [Fourth Dist., Div. Two] (*Poslof*).)

In *Poslof*, for example, the defendant argued on appeal there was insufficient evidence to show he knew he was required to register a second residence he purchased in

Twentynine Palms, because he did not stay there for five or more days at a time and continued to reside in a home in another area where he was already registered. He testified he did not stay in the Twentynine Palms residence for five or more consecutive days specifically because he did not want anyone to get the idea he was moving there. (*Poslof, supra*, 126 Cal.App.4th at pp. 104-105.) We rejected the defendant's argument because he had notice he was required to register multiple locations and because there was enough evidence from which the jury could reasonably infer the defendant was regularly residing in Twentynine Palms with his daughter and/or had actually stayed there for more than five days at a time. In sum, "[t]he evidence was sufficient to support a finding by the trier of fact that defendant's connection to the residence was outside the realm of a brief, isolated sojourn or transitory relationship and that he knew he was required to register the home." (*Id*. at p. 107.)

In this case, there is substantial evidence from which the jury could have reasonably inferred defendant was regularly residing at more than one address at a time. He registered at the 22711 Waalew residence on August 22, 2007, and a deputy went to the residence about eight months later on April 15, 2008, to investigate defendant's whereabouts. At this time, defendant was not there, and Peggy Chism, defendant's ex-wife, told the deputy they were going through a divorce, and defendant moved out "about December" 2007. She later testified defendant moved out of the residence in October 2007 and left some of his belongings at the residence, but they were all gone by the end of October or November, and defendant had not lived there since that time. However, when defendant was arrested the next day on April 16, 2008, he told the deputy his ex-wife was helping him and he had only

moved out "a little over a month ago because she had moved her boyfriend in and that he had been causing problems for him."

Defendant's ex-wife further testified he was living in his truck for awhile and then went to live at his friend Brad's house. She took some of defendant's belongings to him at Brad's house. At this time, defendant was outside Brad's house washing his truck. Brad told her defendant was living there. He lived there "[o]ff and on." She also said he sometimes stayed in his friend Keith's trailer or camper, and she went there to take mail to him. He then moved into Stacey Skinner's house, which was next door to the 22711 Waalew residence, in February 2008.

Stacey Skinner told the deputy during his investigation on April 15, 2008, that she kicked defendant out of her residence in February 2008. However, she later testified defendant lived at her house from February 2008 until the end of May 2008. She told him to leave there in May 2008 because he did not pay the rent. However, some of his belongings were in the house after he left. Her testimony conflicts with defendant's date of arrest, April 16, 2008. In addition, defendant told the deputy after his arrest that "he didn't have a permanent place he was living."

Based on the foregoing, this evidence, when viewed as a whole, is enough for the jury to infer that from October 2007 until the date he was arrested, April 16, 2008, defendant was moving back and forth from one location to the next among several different residences. For example, defendant was living at Brad's house "[o]ff and on" and sometimes stayed in Keith's trailer or camper. We therefore reject defendant's contention

there is insufficient evidence to support a conviction on count 2, failure to register each residence.

Subdivision (b) of section 290.011 states in part as follows: "A person registered at a residence address . . . who becomes transient shall have five working days within which to reregister as a transient in accordance with subdivision (a)" of this section. "'Transient'" means "a person who has no residence." (§ 290.011, subd. (g).) "'Residence'" means "one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles. (§ 290.011, subd. (g).)

Given the broad definition of "residence" in section 290.011, subdivision (g), which includes vehicles, we agree with defendant's contention there is insufficient evidence to support the conviction on count 3, failure to register as a transient in violation of section 290.011, subdivision (b). Our review of the record indicates defendant moved from residence to residence. The evidence showed he lived at the 22711 Waalew residence, Brad's house, Keith's trailer or camper, Stacey Skinner's house, and in his own truck. However, there was no evidence from which the jury could reasonably infer defendant was at any time a transient with no address. As a result, the conviction on this count must be reversed.

Because we conclude there is insufficient evidence to support a conviction for failure to register as a transient, it is unnecessary for us to address defendant's other argument that count 3 must be reversed because the court failed to define the term "transient."

Unanimity Instruction—Counts 1 and 4

Defendant contends the jury's verdicts on count 1, failure to register a change of address, and count 4, failure to advise a prior agency of a change of address, must be reversed because the trial court did not give a unanimity instruction. According to defendant, a unanimity instruction was required because the evidence indicated he moved several times, and the prosecution did not take a position as to which move or moves supported the charges in these two counts. As a result, he believes the jury may have found him guilty without agreeing he committed the acts or omissions forming the basis for these offenses. He also believes the error was not harmless, because there is a strong likelihood the jurors did not agree what change of address defendant failed to register.

"[U]nanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows. [Citation.] The instruction is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) A unanimity instruction is appropriate "when conviction on a single count could be based on two or more discrete criminal events." (*People v. Perez* (1993) 21 Cal.App.4th 214, 223.) " '[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.' " (*People v. Norman* (2007) 157 Cal.App.4th 460, 464 (*Norman*).)

In *Norman*, *supra*, 157 Cal.App.4th at page 462, for example, the defendant was found guilty of receiving stolen property and petty theft with a prior. The prosecution presented evidence of two separate thefts—stolen mail found in a stolen car and mail stolen from mailboxes at an apartment complex. (*Id*. at pp. 462-464.) The prosecution specifically argued defendant was guilty of both thefts without electing which acts constituted which of the charged crimes. (*Id*. at p. 465.) The defendant "proffered a colorable defense." (*Id*. at p. 467.) As a result, "unanimity was not assured on either the theft or the receiving stolen property charge." The case was therefore reversed on appeal for failure to give a unanimity instruction. (*Ibid*.)

Here, defendant was charged in count 1 with violating section 290, subdivision (b), which requires lifetime registration for sex offenders residing in California. Sex offenders must register with local authorities "within five working days of coming into, or changing his or her residence within any city, county, or city and county. . . ." In count (4), defendant was charged with violating section 290.013, which applies to any sex offender "who was last registered at a residence address . . . who changes his or her residence address, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state." (§ 290.013, subd. (a).) Under section 290.013, subdivision (a), sex offenders "shall, in person, within five working days of the move, inform [local authorities] with which he or she last registered of the move, the new address or transient location, if known . . . ." "If the person does not know the new residence address or location at the time of the move, the registrant shall, in person, within five working days of the move, inform the last registering agency or agencies . . . in writing, sent by certified or

registered mail, of the new address or location within five working days of moving into the new residence address or location, whether temporary or permanent." (§ 290.013, subd. (b).)

As outlined more fully above, the prosecution in this case presented evidence indicating that defendant moved multiple times after his prior registration on August 22, 2007. Under the statutory registration scheme applicable to sex offenders, each change of address could have triggered a separate charge for failure to register, so defendant was charged with fewer offenses than was shown by the evidence. The prosecutor did not specifically argue which change of address supported the offenses charged in counts 1 and 4. Under these circumstances, an election by the prosecutor or a unanimity instruction would have been appropriate.

"The failure to provide a unanimity instruction is subject to the *Chapman* harmless error analysis on appeal.[2] [Citation.] Under that standard the question is ' "whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction." ' [Citation.] [¶] . . . 'Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and

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[2] "*Chapman v. California* (1967) 386 U.S. 18."

therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]' [Citation.]" (*People v. Curry* (2007) 158 Cal.App.4th 766, 783.)

On the record before us, we conclude any error in failing to instruct on unanimity was harmless under the *Chapman* standard. There was solid, undisputed evidence indicating defendant knew and understood the reporting requirements and had not registered anywhere after his prior registration on August 22, 2007. Thus, the elements in dispute were whether defendant changed his address after his prior registration on August 22, 2007, and whether any failure to register a change of address after that date was willful. Defendant did not testify in his own defense and did not offer any affirmative evidence of his whereabouts during the time in question, which could have created a conflict in the prosecution's case. Instead, based on counsel's closing argument, the defense theory of the case was twofold. First, counsel argued the registration violations were not willful because defendant was preoccupied with finding a home for and protecting his son during the time in question, so his obligation to register "was either low on his priority list or slipped his mind at the time." Second, counsel argued the evidence was insufficient to prove the charged offenses because there was conflicting and confusing testimony by the witnesses about defendant's whereabouts during the time in question, and police did not search the homes to determine whether any of his belongings were still there. Counsel also suggested maybe defendant was only guilty of living at and failing to report living at multiple locations. It is apparent the jury decided these basic credibility issues against defendant. In closing

arguments to the jury, defendant all but conceded he had moved multiple times since his prior registration on August 22, 2007.

In addition, there was no evidence from which the jury could have reasonably concluded defendant did not change his address multiple times after he registered on August 22, 2007. Tellingly, the jury found defendant guilty in count 2 of failing to register multiple residences. As a result, it is obvious the jury believed the testimony of all of the witnesses who said defendant had changed addresses on several occasions during the time in question. In other words, the facts and circumstances here are distinguishable from those in *Norman*, *supra*, 157 Cal.App.4th at pages 462-467, where the jury had at least some basis for disagreement over the defendant's involvement in discrete criminal events. Because any one of these moves would have been enough to support the challenged offenses, there is overwhelming evidence in the record to support the jury's verdicts notwithstanding the absence of a unanimity instruction. We therefore conclude any failure to give the unanimity instruction was harmless beyond a reasonable doubt.

Calculation of Presentence Custody Credits

The record shows defendant was in presentence custody from the date of arrest, April 16, 2008, until the date he was sentenced, December 22, 2008. As the parties agree, this was a total of 251 days. The trial court only awarded defendant 250 days of credit for presentence custody. Section 2900.5, subdivision (a), states that "all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment. . . ." Therefore, defendant should be awarded one additional day of presentence custody credit.

DISPOSITION

The judgment is reversed as to count 3 only, failure to register as a transient in violation of section 290.011, subdivision (b). In addition, the case is remanded for the limited purpose of correcting the amount of presentence custody credits awarded from 250 days to 251 days and to recalculate and correct the total number of days of presentence credit shown on the abstract of judgment. The Superior Court of San Bernardino County shall resentence defendant accordingly and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.